Supreme Court, U.S.
FILED

96 507 JUL 29 1996

OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October 1995 - October 1996 Term

JAMES GRAHAM,

Petitioner,

against

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED:

1. Whether Section 296 (16) of the New York Executive Law is preempted by Federal Law.

2. Whether federal nuclear regulations provide a specific statutory exception to Section 296 (16).

B. LIST OF PARTIES

1. **JAMES GRAHAM,**

Petitioner-Plaintiff,

2. **NIAGARA MOHAWK POWER CORPORATION,**

Respondent-Defendant.

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3. *Hines v. Davidowitz*, 312 U.S. 52, 60 S. Ct. 399.

4. *Jones v. Rath Packing Co.*,430 U.S. 519, 97 S.Ct. 1305.

5. *Pacific Gas & Electric*, 461 U.S. 190, 103 S.Ct. 1713.

6. *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 219, 67 S. Ct. 1146.

7. *Savage v. Jones*, 225 U.S. 501.

8. *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L. Ed. 307.

9. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441.

10. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed 2d 416.

F. BASIS OF JURISDICTION.

The Order sought to be reviewed was entered by the Clerk of the New York Court of Appeals on May 2, 1996. The basis of jurisdiction is 28 USC Section 1254(1), as Petitioner is appealing from a decision of the highest Court of the State of New York.

G. STATUTORY AND REGULATORY PROVISIONS.

1. Section 296(16) of the New York Executive Law:

"It shall be an unlawful and discriminitary practice unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the State in any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely through the individual involved any arrest or criminal accusation of such individual not been pending against that individual which was followed by the determination of that criminal action, as defined in Subdivision 2 Section 160.50 of the Criminal Procedure Law, in connection with the licensing employment or providing credit or insurance to such individual, provided that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms or deadly weapons."

2. Section 160.60 of the New York Criminal Procedure Law:

Upon the termination of a criminal action or proceeding against a person in favor of such person, is defined in Section 160.50 of this chapter, the arrest and prosecution shall be deemed a nullity and the accused shall be restored in contemplation of law to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession or calling.

Except where specifically required or permitted by statute of a superior Court or upon specific authorization of a specific Court, no such person shall be required to divulge information pertaining to the arrest or prosecution.

3. 10 C.F. R. 73.57 (c) (1)

A licensee may not base a final determination to deny an individual unescorted access to the nuclear power facility or access to safeguard information solely on the basis of information received from the FBI involving:

(i) An arrest more than one year old for which there is no information of the disposition of a case; or

(ii) An arrest that resulted in dismissal of the charge or an acquittal.

4. 10 C.F.R. 10.11 (a) (8), (9)

5. 10 C.F.R. 73.56 (b) (1)

6. 10 C.F.R. Section 973.57

7. 42 U.S.C.A. Section 5841

8. 42 U.S.C.A. Section 2169 (Supp.1993)

9. 635 NYS2d 405

H. STATEMENT OF FACTS.

Beginning in 1961, James Graham (hereinafter "Graham") was arrested on charges of Grand Larceny. These charges were based on the conduct of Shirley Ann Graham, an individual to whom Graham was married at the time. The charges were subsequently dismissed.

In 1967, Graham was arrested on charges of passing a worthless check. Again, Graham was arrested as a result of said Shirley Graham's activities. No disposition was reported on these charges. As Graham was released and no further prosecution or conviction resulted from them, Graham believed that in fact they were dismissed. And in effect, they were.

On or about March 1, 1992, Graham was engaged by his union to work as a pipefitter at the Nine Mile Two Nuclear Power Facility of Niagara Mohawk Power Corporation (hereinafter "Niagara Mohawk"). For such purposes Graham filled out an application for security clearance. In such purposes Graham filled out an application for security clearance. In such application, Graham was wrongfully asked by Niagara Mohawk whether he had ever been dismissed and that his record had been sealed, Graham answered that he had not in fact been arrested.

Thereafter Niagara Mohawk excluded Graham from its Nuclear Power Facilities for a period of two years on the alleged grounds that he had been found untrustworthy and unreliable by reason of his alleged failure to state that he had been arrested.

As Graham lived in a rural area, he found little work in his field during the two years that followed. Thus as a result of the exclusion, he suffered considerable hardship and

experienced severe financial losses.

Graham brought suit against Niagara Mohawk in New York Supreme Court on the grounds that it had violated Section 296 (16) of the New York Executive Law by (1) asking him whether he had ever been arrested, and (2) denying him security clearance as a result of such questioning.

The federal questions were raised by Niagara Mohawk in its answer, in which it argued that federal nuclear regulations allowed and even compelled it to make inquiries as to arrests. Thus, it further argued: (1) the state law was superseded by the federal regulations and (2) the regulations provided a specific exception to the statute taboo of questions involving arrest.

At the time it submitted its answer, Niagara Mohawk removed the case to federal court. By order dated May 17, 1994, the United States District Court returned the case to New York Supreme Court.

On motion, the trial-level court granted summary judgment dismissing the complaint. In a decision of November 4, 1994, the Court ruled that (1) by reason of the regulation, the statute allowed the question to be asked and (2) even if Niagara Mohawk violated the New York statute, the statute was superseded by the regulations.

The decision was upheld on appeal by the Appellate Division, Fourth Department of the New York Supreme Court. No written decision was issued.

By decision entered May 2, 1996, The New York Court of Appeals denied Graham's motion for permission to appeal.

GROUNDS FOR CERTIORARI

GROUND I

Section 296 (16) of the New York Executive Law is not preempted by Federal Law

The decision of the Courts of the State of New York in the case are contrary to the holdings of the United States Supreme Court regarding the preemption by federal law over state law. The Supreme Court has consistently held that where there is no conflict between state and federal law, either expressed or implied, state law applies. Specifically, as held in *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270, state law may apply, in the absence of a conflict, even in cases involving such federal matters as nuclear regulation.

It is our contention that no conflict between state and federal law exists in the case herein. As the state law forbidding Niagara Mohawk to question Graham with regard to Graham's prior arrest. His prior arrest does not conflict with or potentially impede federal nuclear regulations, the state law remains in effect.

The Supreme Court has fully set forth, in *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270, the test by which to determine whether or not a state law is preempted by federal law as specifically applied to nuclear regulation.

The first part of the test seeks to determine whether the pre-emption is expressed in the explicit language of the federal law. 496 U.S. at 78, 110 S. Ct. at 2275. The second part seeks, in the absence of explicit statutory language, to determine the scheme of federal regulation in a given field is extensive so as to give rise to the reasonable inference that the Congress in-

tended for the federal government to dominate the field. 496 U.S. at 79;110 S. Ct. at 2275.

Where the "(S)cheme of federal regulation (is) so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it "[O]r where a federal law" (t)ouch(es) a field in which the federal interest is so dominant the assumption is created that the federal law has pre-empted the applicable state laws. *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 67 S. Ct. 1146. Yet in order for a federal law to pre-empt state law in a field that has been traditionally policed by the states, the Congressional interest to so pre-empt the powers of the States must be "clear and manifest." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152.

The third part of the test inquires into whether the state law is actually in conflict with the federal law. *English v. General Electric Co.*, 496 U.S. at 79, 110 S. Ct. at 2275. As the Supreme Court stated in *Hines v. Davidowitz*, 312 U.S. 52, 67, 60 S. Ct. 399, 404 a case concerning state registration of aliens, "Our primary function is to determine whether, under the circumstances of (a) particular case, the (state) law stands as an obstacle to the accomplishment and execution of the full purposes of Congress." In the absence of such an obstacle being placed by the state law, no conflict exists and the state law is not pre-empted. *English v. General Electric Co.*, 496 U.S. 72, 90, 110 S. Ct. 2270; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373, U.S. 132, 142, 83 S. Ct. 1217; *Savage v. Jones*, 225 U.S. 501, 533.

English v. General Electric Co., supra, concerned a plaintiff who sued her former employer, a nuclear power agency, on

grounds that had arisen from her employment at its nuclear power facility. Among the causes of action listed in the complaint was that of intentional infliction of emotional distress. The issue therefore arose of whether that tort cause was precluded by federal nuclear laws.

Finding no explicit statutory language that would pre-empt the state law on the intentional infliction of emotional distress as arising from the operation of a nuclear power facility, the Supreme Court passed on to the next question of whether the state law was made in a field dominated by federal government. Laws concerning the intentional infliction of emotional distress were rooted in torts, a field of law that was of traditional interest. In the field of nuclear regulation, the federal government has exclusive control on matters of safety so as to pre-empt all state laws on that question. *Pacific Gas & Electric* 461 U.S.190,212, 103 S. Ct. 1713, 1726. Yet *English* concerned intentional infliction of emotional distress, a tort of action in the common law of the States. Here the court held that laws made in areas of traditional state concern, such as tort law, may nonetheless apply to the operation of a nuclear power facility without conflict or pre-emption. As the Court stated:

> **In addressing this issue, we must bear in mind that not every state law that in some remote way may effect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field. We have no doubt, for instance, that the application of state minimum wage and labor laws to employees at nuclear facilities would not be pre-empted, even though these laws**

> **could be said to affect tangentially some of the resource allocation decisions that might have a bearing on radiological safety. Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that the claim for intentional infliction of emotional distress may have some effect on these decisions... nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field.**
>
> 496 U.S. at 83, 110 S. Ct. at 2270.

Finding in the legislative history no "clear and manifest" intent of Congress to pre-empt state law on the issue (496 U.S. at 83, 110 S. Ct. 2278), the Court moved on to the question of whether the State law frustrated Congressional intentions behind the nuclear regulatory statutes. Ruling that it did not, the Court held that the plaintiff's claim of intentional infliction of emotional distress was not pre-empted. In conclusion, the Court declared, "The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.'" 496 U.S. at 90, 110 S. Ct. at 2281.

As in *English*, the State law at issue here is not pre-empted by federal law. As stated above, neither the federal statutes nor the federal nuclear regulations expressly authorize Niagara Mohawk, or other nuclear agencies to ask applicants whether they have ever been arrested.

On the second level of inquiry, Section 296(16) of the New York Executive Law is not concerned with safety or other nuclear regulatory matters. Rather, it is concerned with matters traditionally policed by the States such as employment, human, civil and anti-discrimination rights. The federal regulations, therefore, would pre-empt the State law only if Congress displayed a "clear and manifest" intent to pre-empt State law on these matters.

In its motion papers, Niagara Mohawk stated the concern of the Nuclear Power Commission regarding criminal convictions of applicants, as reflected in 10 C.F.R. Section 10.11(a)(8),(9). Yet Graham was never convicted. Inquiries into conviction records of applicants are not at issue. Niagara Mohawk has also produced compelling reasons for its assertion that the Congress intended for background checks to be done on applicants. Yet this is not at issue. The only issue here is whether the Nuclear regulations authorized Niagara Mohawk to ask Graham whether he had ever been arrested; and neither Congress nor the Nuclear Power Commission, through either the legislative history or through the Statutes or regulations, revealed a "clear and manifest" intent to pre-empt State law on this issue.

Finally we must address the question of whether the Section 296(16) of the New York Executive Law, as applied to the facts in this particular case, would frustrate the intention of the Congress in promulgating laws regarding Nuclear regulation and safety. The intention of Congress, and of the Nuclear Regulatory Commission, was to secure safety in the operation of nuclear power facilities. Therefore, the Nuclear Regulatory Commission ratified regulations not merely allowing but

commanding nuclear agencies to conduct investigations into the backgrounds of persons seeking access to secured areas at power facilities so as to ascertain their trustworthiness and reliability.

In no respect does Section 296(16) frustrate that purpose. It does not seek to block agencies from conducting background check, from conducting fingerprint investigations or from asking applicants whether they have ever been convicted of a crime. It therefore fully allows agencies to obtain the information from which trustworthiness and reliability are determined.

No such permission, however, is given. 10 CFR 73.56 (B) (1) (2) dictates that nuclear agencies must conduct background checks on applicants seeking access to secured areas at nuclear power facilities. 10 CFR Section 973.57 requires that fingerprint checks be made of applicants in order that the FBI may conduct thorough background investigations thereon.

Yet nowhere do these regulations expressly or specifically require or allow inquiries to be made as to **arrest** records of applicants. Nowhere do they allow an agency to ask an applicant whether he or she has ever been arrested.

To the contrary of Niagara Mohawk's assertions, the state and federal laws of this issue closely parallel and are kindred in spirit to one another. Both reflect a strong concern for human rights. Significantly Section 10 C.F.R. Section 73.57(c)(1) states:

> **A licensee may not base a final determination to deny an individual unescorted access to the nuclear power facility or access to safeguard information solely on the basis of information received from the**

FBI involving:

(i) An arrest more than one year old for which there is no information of the disposition of a case; or

(ii) An arrest that resulted in dismissal of the charge or an acquittal.

It must, be according to this regulation that "trustworthiness" and "reliability" be defined. A person arrested by not convicted is not considered a threat to nuclear safety. Instead, he or she is given statutory and regulatory protected.

This regulation, therefore, not merely renders questions concerning arrests unnecessary; it also expresses a legislative repugnance toward them.

Niagara Mohawk states that it did not deny Graham access because of the arrest but because rather he was untrustworthy in that he "lied" about the arrest. Indeed, the Court granted summary judgment in agreement with this assumption. But this is in fact an assumption of fact and does not warrant and is not adequate grounds for the granting of such judgment.

This fact is disputed by Graham. As stated in the record, the Frederick McCarthy representing Niagara Mohawk told Graham that he would have not been excluded had it not been for the Graham larceny arrest. Such a statement clearly points to the fact that McCarthy was motivated by the arrest and by the severity of the charges. Thus, by stating that it made its decision based on Graham's proported untrustworthiness, it is merely trying to go around the back door in an attempt to punish him for the arrests.

Moreover, this particular question is clearly analogous to the "fruit of the poisonous tree" doctrined in Federal Constitu-

tional criminal law. In Constitutional criminal law, where the police have obtained information or evidence illegally and unconstitutionally, the evidence is excluded from being used for purposes of criminal prosecution. *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307; *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441; *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L. Ed. 2d 416.

Therefore, where Niagara Mohawk asked a question illegally, it cannot lawfully punish Graham for the answer he gave to the question.

Finally, according to New York Law, Graham was not being dishonest.

Section 160.60 of the New York Criminal Law states:

> **"Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined by Section 160.50 of this chapter, the arrest and prosecution shall be deemed annuity and the accused shall be restored in contemplation of the law to the status he occupied before the arrest and prosecution. The arrest and prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession or calling. Except where it is specifically required or permitted by statute of a superior Court or other specific authorization of the specific court, no such person shall be required to divulge information pertaining to the arrest or prosecution."**

Thus, pursuant to the dismissal of the charges, the exonerated person is restored to the status that he or she enjoyed prior

to the arrest. By operation of law, the arrest becomes nonexistent. It follows from this that was being truthful when he stated that he had not been arrested.

In the absence of a contrary federal law, then, the state law applies. And even in a matter involving public security such as nuclear regulations, human rights laws apply. For it is paramount to our national interest maximum consideration be given to human rights even in the presence of other vital issues.

GROUND II

THE REGULATIONS DO NOT PROVIDE A SPECIFIC STATUTORY EXCEPTION TO SECTION 296 (16) OF THE NEW YORK EXECUTIVE LAW.

Graham does not contest Niagara Mohawk's power or duty to do a background check in order to ascertain whether applicants seeking access into high security areas in nuclear power facilities are trustworthy and reliable. Nor does Graham contest Niagara Mohawk's federally given power to do fingerprint checks on applicants. Nor does Graham contest Niagara Mohawk's power to ask applicants if they had ever been convicted of a crime. Such activities fulfill a serious public purpose. It is in the public interest that thorough security investigations be made of persons seeking access into such places. This public policy has been expressed by Congress in its statutes and by the Nuclear Regulatory Commission agencies in its regulations.

But, Graham contests that Niagara Mohawk acted unlawfully in (1) asking him whether he had ever been arrested and (2) in excluding him from its facilities. With regard to both wrongs, Graham is backed by Section 296 (16) of the New York Executive law which states:

> **"It shall be an unlawful discriminatory practice unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the State and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely through the individual involved**

any arrest or criminal accusation of such individual not then pending against that individual which was followed by a determination of that criminal action, is defined in subdivision 2 of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing credit or insurance to such individual, provided that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms or deadly weapons."

Graham's first arrest resulted in dismissal of the charges. The second arrest resulted neither in prosecution nor in conviction. It was tantamount to a dismissal. Therefore, Niagara Mohawk violated Section 296(16) in asking Graham whether he had ever been arrested.

The order of the Court is contrary to the strong public policy favoring the presumption of innocence of persons accused of a crime. This presumption is one of the foundations of Anglo-American jurisprudence. It forms the basis of Section 296 (16) of the New York Executive Law. It is also the basis of Section 160.60 of the New York Criminal Procedures Law, which is stated hereinabove, nullifies the arrest and returns the accused to the status that he or she enjoyed prior to the arrest.

As stated in Ground I above, the federal nuclear regulations do not compel or even allow a nuclear agency to ask an applicant whether he or she was ever arrested. The regulation forbidding the exclusion of a person from a nuclear secured area by reason of an arrest that either (1) resulted in a dismissal of the charges or (2) is more than one year old and has no

reported disposition negate any need on the part of the agency to ask questions regarding arrests.

Moreover, these regulations are not statutes. In its briefs made on motion, Niagara Mohawk cited the statues of the Energy Reorganization Act of 1974 (the "ERA"), 42 U.S.C.A. Section 5841 et. seq. (1983) and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (the "Security Act"), 42 U.S.C.A. Section 2169 (supp. 1993).

But these statutes do not allow expressly or implicitly inquiries to be made as to arrest records of applicants seeking access to high security places at nuclear facilities. 42 U.S.C.A. Section 2169, in fact, expressly seeks to protect applicants who had been arrested where either the arrest has resulted in dismissal of the charges or where the arrest is more that one years old and no disposition has been reported. This concern is reflected in the nuclear regulation at 10 CFR Section 73.57 (C) (1).

Dated: July 24, 1996.

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APPENDIX

Lower Court Decisions and Orders